

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

February 10, 2009 Session

**EARNEST GWEN HUMPHREY v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for White County**  
**No. CR815 David Patterson, Judge**

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**No. M2008-01069-CCA-R3-PC - Filed September 29, 2009**

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Petitioner was convicted by a White County jury of second degree murder. He agreed to a sentence of twenty-two years. His appeal to this Court was unsuccessful. He subsequently filed a petition for post-conviction relief. In his petition he alleged that he was afforded ineffective assistance of counsel. The post-conviction court denied the petition, and Petitioner appealed. After a thorough review of the record, we conclude that Petitioner was unable to prove that counsel's representation was below the level required for effective assistance or that there is a reasonable probability that had counsel's representation matched that argued by Petitioner the outcome at trial or on appeal would have been different. Therefore, we affirm the post-conviction court's denial of the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Robert L. Jolley, Jr., Knoxville, Tennessee, for the appellant, Earnest Gwen Humphrey.

Robert E. Cooper, Jr., Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; Bill Gibson, District Attorney General; and William Locke and Ben Fann, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

Petitioner's wife and the victim had been having an extra-marital affair. *State v. Earnest Gwen Humphrey*, No. M2003-01489-CCA-R3-CD, 2005 WL 2043778, at \*1 (Tenn. Crim. App., at Nashville, Aug. 24, 2005), *perm. app. denied*, (Tenn. Feb. 6, 2006). Petitioner was informed of the affair on February 24, 2001. *Id.* at \*5. On April 18, 2001, Petitioner told his wife that he did not trust her and took the keys to her car. *Id.* at \*2. He told her that if she wanted to be with the victim she could go. However, the victim would have to come inside the house to pick her up. *Id.* The

victim arrived at Petitioner's house later that day. When he arrived, Petitioner shot and killed the victim. *Id.* Following a jury trial, Petitioner was convicted of second degree murder. *Id.* at \*6. Petitioner agreed to a sentence of twenty-two years in incarceration. *Id.* at \*1. Petitioner appealed his conviction to this Court. We affirmed his conviction. *Id.*

On February 5, 2006, Petitioner filed a petition for post-conviction relief. In his petition he argued that he received ineffective assistance of counsel and that the State denied him both his due process rights and the right to a fair trial. The post-conviction court held an evidentiary hearing on March 20, 2008. There were three witnesses at the hearing, Petitioner, Petitioner's son, and trial counsel.

Petitioner was the first witness at the hearing. He testified that trial counsel told him that he would not have to serve any time for the murder. Petitioner stated that he was told this before trial. Trial counsel told Petitioner that he believed the State would offer a plea bargain, but trial counsel advised Petitioner not to accept any kind of plea bargain. According to Petitioner, the State offered second degree murder, and trial counsel advised him not to take it. Petitioner stated that after trial, trial counsel did not discuss the sentencing process in Tennessee. Trial counsel told Petitioner that the sentence for second degree murder was fifteen years and went up from there. In addition, trial counsel did not inform Petitioner about any type of United States Supreme Court decisions or appellate decisions questioning the constitutionality of Tennessee's sentencing law. Petitioner was not aware of these challenges until he got to the penitentiary.

Trial counsel told Petitioner that they had retained an expert witness who was investigating a glass fragment they had found. This witness testified at trial. Petitioner also testified that he thought that trial counsel had neglected to question Petitioner's wife about several issues when she testified at trial. He stated that trial counsel should have asked his wife where she was when the incident occurred, whether she and the victim were planning a trip together, and whether she and the victim were planning on harming Petitioner. Petitioner also believed that trial counsel should have asked his wife what the specific location of the victim's body was after he had been shot.

On cross-examination, Petitioner denied that he had told trial counsel that he did a good job after cross-examining Petitioner's wife. Petitioner stated that he should have told trial counsel that he should have asked his wife more questions. The post-conviction court asked Petitioner if he knew that his wife would have responded in the affirmative to being asked if she was planning a trip. Petitioner answered that he did not know what she would have answered. Petitioner also admitted that he did not know what his wife's responses would have been to the questions he asserts should have been asked. Petitioner also stated that the State's reference to Osama Bin Laden made during closing argument did not appear to him to be restricted to how Petitioner treated his wife.

Wade Humphrey, Petitioner's son, was the next witness at the post-conviction hearing. Mr. Humphrey testified concerning conversations between Petitioner and trial counsel regarding a plea offer made by the State for second degree murder. According to Mr. Humphrey, trial counsel told Petitioner that he would not have to serve any time if they were able to prove that the victim

borrowed a gun and came to the house with the gun. Mr. Humphrey agreed that if the jury had believed Petitioner's version of events he would not have gone to jail, and if the jury believed his mother's version of the events, Petitioner would have been convicted of first degree murder. Mr. Humphrey stated that Petitioner would have rejected any offer of second degree murder presented by the State.

Trial counsel also testified at the hearing. He stated that he had been practicing law for thirty-six years, and he has a general practice with an emphasis on criminal law. Trial counsel testified that he never told Petitioner that he would not spend any time in jail. He stated that he may have told Petitioner that, according to Petitioner's version of events, he had a good case for self-defense. Petitioner was insistent that he not plead to something he did not do, therefore, trial counsel was precluded from any formal discussions of offers and negotiations for a guilty plea. The State told trial counsel at one point that the lowest they could do was second degree murder. Trial counsel recalled that Petitioner was adamant that he would not plead to anything because Petitioner believed that he acted in self-defense. Trial counsel denied that he advised Petitioner to reject a plea offer.

Trial counsel agreed that Petitioner and his wife had completely different versions of the events surrounding the incident. Trial counsel stated that he cross-examined her extensively on the inconsistencies in her statements and testimony. When the State compared Petitioner to Osama Bin Laden, trial counsel felt that it was ridiculous. He stated that he did not object at the time because he did not want to call any more attention to it. Trial counsel also admitted on reflection, he probably should have objected to it. Trial counsel stated that the State was comparing how Petitioner treated his wife, not making any reference to the gun, so he did not object. He stated that by objecting and asking the trial judge to strike the statement, he would have reemphasized the statement to the jury.

On cross-examination, trial counsel was questioned extensively on his cross-examination of Petitioner's wife. He stated that it was important to point out any inconsistencies in her testimony. Trial counsel testified that the strength of his case was to show that Petitioner's wife "was inconsistent and not telling the truth, therefore not believable on anything." Trial counsel also stated that he did not want her to just retell her version of the facts when he was cross-examining her. With regard to sentencing, trial counsel testified that he was not sure when he became aware that there were individuals challenging Tennessee's sentencing laws pursuant to *Blakely v. Washington*, 540 U.S. 965 (2003). However, at the time of appeal, the Tennessee Supreme Court had not ruled on the issue. Trial counsel admitted that he did not raise the issue on appeal. Post-conviction counsel also questioned trial counsel as to why he did not object to the State's comparison of Petitioner's treatment of his wife to Osama Bin Laden. Trial counsel stated that he did not want to re-emphasize the comment and he "made a conscious decision to let it go by . . . ."

In an order filed April 15, 2008, the post-conviction court denied the petition for post-conviction relief. The post-conviction court found that Petitioner had not proven that counsel had been ineffective or that the outcome of the trial or appeal would have changed if the trial and appeal had occurred as presented in Petitioner's issues. Petitioner filed a timely notice of appeal.

## **ANALYSIS**

On appeal, Petitioner argues that trial counsel was ineffective because he failed to effectively cross-examine Petitioner's wife; he failed to object to the State's comparison of Petitioner's treatment of his wife to that of Osama Bin Laden's; and he failed to challenge the constitutionality of Tennessee's sentencing law.

### **Standard of Review**

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

### **Effective Assistance of Counsel**

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the post-conviction court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is *de novo*" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.*

However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

### **Cross-examination of Petitioner's Wife**

Trial counsel testified at the post-conviction hearing that he extensively cross-examined Petitioner's wife at trial. When post-conviction counsel questioned trial counsel about specific topics for cross-examination of Petitioner's wife, trial counsel's testimony clearly showed that he was effective in his cross-examination. He stated that his goal during cross-examination was to show that Petitioner's wife testified to many inconsistencies and that she was generally unbelievable while precluding her from retelling her version of the facts. This is a reasonably-based trial strategy in a case where Petitioner's wife and Petitioner had widely varying stories as to the facts and the two were the only eyewitnesses to the crime. Petitioner was unable to prove that counsel was either ineffective in his cross-examination or that he was prejudiced by the cross-examination. We conclude that trial counsel was effective with regard to this issue.

Therefore, this issue has no merit.

### **Osama Bin Laden Comment**

At the hearing, trial counsel stated that he found the State's comparison of Petitioner's treatment of his wife to Osama Bin Laden to be ridiculous. However, he did not want to object on the basis that an objection would reemphasize the comment to the jury. Trial counsel testified that he made a conscious decision not to object to the statement.

Trial counsel's decision not to object was a tactical decision made during the course of the proceedings. Therefore, Petitioner did not prove that counsel was ineffective by not objecting to the State's statement during closing argument.

Therefore, this issue has no merit.

### **Constitutionality of Tennessee's Sentencing Statute**

Petitioner argues that trial counsel, who also represented Petitioner on appeal, was ineffective because he did not challenge Tennessee's sentencing statute based upon the United States Supreme Court ruling in *Blakely*. The State argues that trial counsel was effective in advising Petitioner to agree to the twenty-two year sentence; that this issue is waived because Petitioner did not specifically state in his pleadings that trial counsel did not raise the issue of the sentencing statute's constitutionality on appeal as opposed to at trial, and that *Blakely* does not apply retroactively to cases on collateral appeal.

We first address the State's waiver issue. It is true that Petitioner did not specifically state that the issue is referring to trial counsel's representation of Petitioner on appeal. However, Petitioner was convicted at the conclusion of a jury trial on May 14, 2002, before the United States Supreme Court had decided *Blakely*, which was filed on June 24, 2004. We believe that all parties involved understood that Petitioner was referring to the failure to raise the issue on appeal. Therefore, we conclude that this issue is not waived for purposes of this appeal.

The State also argues that *Blakely* does not apply in this case because case law in this State has concluded that *Blakely* does not apply to cases on collateral appeal. This argument by the State misses a key point in Petitioner's cases. While it is true that *Blakely* does not apply to cases on collateral appeal, in those cases, the defendants were directly attacking their sentences. See *Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at \*3 (Tenn. Crim. App., at Nashville, May 1, 2007); *James R.W. Reynolds v. State*, No. M2004-02254-CCA-R3-HC, 2005 WL 736715, at \*2 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), *perm. app. denied*, (Tenn. Oct. 10, 2005); *Carl Johnson v. State*, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at \*4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), *perm. app. denied*, (Tenn. June 27, 2005); *Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at \*9-10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. app. denied*, (Tenn. May 23, 2005). In Petitioner's issue, he is arguing that counsel was ineffective because he failed to raise the issue. This argument is not a direct attack on his sentence, but rather an attempt to secure a new trial because of an unconstitutional level of representation by counsel.

We now address Petitioner's argument. The principles are the same when determining the effectiveness of both trial and appellate counsel. *Campbell v. State*, 904 S.W.2d 594, 596 (Tenn. 1995). A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel was objectively unreasonable in failing to raise a particular issue on appeal, and (2) absent appellate counsel's deficient performance, there was a reasonable probability that the petitioner's appeal would have been successful before the state's highest court. See, e.g., *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Aparicio v. Artuz*, 269 F.3d 78, 95 (2d Cir. 2001); *Mayo v. Henderson*, 13 F.3d 528, 533-34 (2d Cir. 1994).

It is counsel's responsibility to determine the issues to present on appeal. *State v. Matson*, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986). This responsibility addresses itself to the professional judgment and sound discretion of appellate counsel. *Porterfield v. State*, 897 S.W.2d 672, 678 (Tenn. 1995). There is no constitutional requirement that every conceivable issue be raised on appeal. *Campbell*, 904 S.W.2d at 597. The determination of which issues to raise is a tactical or strategic choice. *Id.*

In *Blakely*, the Supreme Court determined that the "statutory maximum" sentence that is constitutionally allowable is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." 542 U.S. at 303. Therefore, the application of enhancement factors determined to be present by a trial judge would not be constitutionally allowable to increase a defendant's sentence.

In response to *Blakely*, the Tennessee Supreme Court filed *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005) (*Gomez I*). Petitioner's appeal was heard at this Court's session on March 8, 2005. Our supreme court did not make a ruling regarding the effect of the United States Supreme Court's decision in *Blakely* until *Gomez I*, on April 15, 2005, after the date upon which Petitioner's appeal was heard. In that case our supreme court found Tennessee's sentencing scheme constitutional.

As a result of *Blakely* and subsequent opinions in both Tennessee and the United States Supreme Court, the use of some enhancement factors as set out in the Tennessee sentencing statute at the time Petitioner was sentenced were later held to be unconstitutional. See *Cunningham v. California*, 549 U.S. 270 (2007); *State v. Gomez*, 239 S.W.3d 733 (Tenn.2007) ("*Gomez II*"). Petitioner now bases his argument of ineffective assistance of counsel on the fact that trial counsel did not raise this issue on appeal.

However, after a review of the record, we have determined that trial counsel would have been precluded from raising this issue on appeal. The reason we have reached this conclusion is because, in Petitioner's case, the parties agreed upon a sentence of twenty-two years. For this reason, the trial court did not apply any enhancement factors, or mitigating factors, to reach a sentence. Both the State and Petitioner stated on the record at the sentencing hearing that they agreed to the twenty-two year sentence. Therefore, Petitioner would not have been able to challenge the application of enhancement factors to his sentence as unconstitutional, because no enhancement factors were applied to his sentence. See *State v. Christy Mechelle Thompson*, No. E2004-00761-CCA-R3-CD, 2005 WL 282875, at \*3 (Tenn. Crim. App., at Knoxville, Feb. 7, 2005). Therefore, there is no reasonable probability that Petitioner would have been successful on this issue on appeal.

Trial counsel was not ineffective for failing to raise this issue because there was no basis to raise the issue, and Petitioner has not proven that there is a reasonable probability that he would have been successful on this issue on appeal.

Therefore, this issue has no merit.

### **CONCLUSION**

For the foregoing reasons, we affirm the decision of the post-conviction court.

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JERRY L. SMITH, JUDGE